***United States Court of Appeals***

***for the Second Circuit***


# BRIEF FOR APPELLANT

ORIGINAL WITH PROOF OF SERVICE

# 74-1176

To Be Argued By
HENRY B. ROTHBLATT

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P/S

## UNITED STATES COURT OF APPEALS

*for the*

## SECOND CIRCUIT

UNITED STATES OF AMERICA,

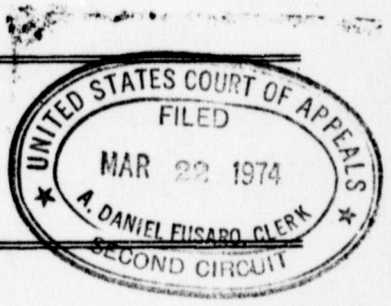
Appellee,

-against-

HOWARD FUCHS,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT & COMMITMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK




# APPELLANT'S BRIEF

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## PRELIMINARY STATEMENT

Appellant Howard Fuchs and co-defendant Carlos Trespalacios were indicted and tried for conspiracy under Sections 841(a)(1), 952(a), 460(a)(1), and 846 and 963 of U.S.C. Title 21.

The government's proof consisted primarily of the testimony of Michael Arlen, Carol Richner, and Edward Cohn, alleged co-conspirators who previously had pleaded guilty. Carlos Trespalacios was acquitted.

## THE SUPPLIERS

The government alleges that around mid-September, 1972, Michael Arlen met Hemel Pantoja and John Gonzalez (P.39). Pantoja and Gonzalez had a source of cocaine located in South America. The cocaine was sequestered in the cockpit of a weekly Sunday night Avianca flight from Bogota, with a lay over at J. F. K. airport in New York (P.69). Pantoja worked at J.F.K. airport as an airport maintenance man and therefore had easy access to arrival information and the cocaine hidden on board the plane (P.69, 209).

Upon obtaining the cocaine from the plane, Pantoja would hide it in his locker at the airport, and at night transport it back to his home on Rennington Street in Patterson, New Jersey out of which Pantoja and Gonzalez conducted their cocaine transactions (P.56, 57, 210).

## ARLEN MEETS FUCHS

Upon first meeting Pantoja and Gonzalez, Arlen requested merely a sample of the cocaine so that he could use it to solicit customers (P.49).[1] Arlen made arrangements to sell the cocaine to Carol Richner and Matt Youdelman, friends of his living in New York City (P.51). Richner advised Arlen that she could sell some for him, where upon Arlen picked up approximately four ounces of cocaine from Pantoja and Gonzalez, and gave it to Richner who disposed of it (P.59, 60, 61).

There were a few similar transactions involving Richner, however, the supply of cocaine steadily increased above the demand (P.67, 70, 71, 75 ), and Arlen required a larger market (P.80).

Knowing that Miss Richner had an acquaintance, Howard Fuchs, whom Arlen had met once several months prior thereto, Arlen importuned and finally persuaded Miss Richner to call him (P.80).

Arlen spoke to Fuchs on the phone (P.82), and Fuchs, Richner, and Arlen met at Fuchs' apartment located at 305 East 24th Street, New York, New York (P.84) where they allegedly discussed Arlen's cocaine connection (P.84).

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1. "P" refers to pages in the trial transcript.

## NATURE OF THE TRANSACTIONS

It is alleged that over a period of some eight months, from September, 1972 until May, 1973, many transactions occurred involving Arlen and Fuchs with respect to the cocaine which Arlen had obtained from Pantoja and Gonzalez.

It is alleged that a general course of action emerged whereby Arlen would travel out to Pantoja and Gonzalez at their Pennington Street address in Paterson, New Jersey, receive what usually amounted to one half kilo of cocaine, and return to Fuchs' apartment in New York. Whereupon Fuchs would sell the cocaine to various sources and pay Arlen, who would then return to Paterson, pay Pantoja and Gonzalez and receive another consignment of cocaine (P.178-188, 195, 208).

## INVOLVEMENT OF DAVID KLINE

It is alleged that Arlen and Fuchs made arrangements with David Kline for the use of rented automobiles leased by David L. Limousines (P269) of which Mr. Kline was the owner. An arrangement was also made whereby Arlen and Fuchs would use David Kline's apartment and place of business for the storage of their cocaine (P271). The federal authorities subsequently arrested David Kline on May 15, 1973 (P.330).

## RICHARDSON AND COHN

Toward the end of November, Arlen met Ed Cohn. At this meeting Arlen sold Cohn one half kilo of cocaine (P. 216).

Arlen and Cohn subsequently became excellent friends (P.216) and in late January, 1973, they went to the St. Moritz Hotel in New York to visit Richardson, an old friend of Arlen who was arranging to sell some cocaine to customers arriving from Atlanta (P. 225-230 ). At this meeting Arlen sold one half kilo of cocaine to Richardson, whereupon Richardson immediately sold it to customers who were waiting in an adjoining room (P.231). Thereafter, Richardson and Cohn were involved in several more transactions of a similar nature allegedly with Fuchs and Arlen.

## THE TAINT HEARING

Vincent Montemarano was a patrolman assigned to the Bronx District Attorney Office Squad since June, 1972 (P.133). The Bronx investigation of Howard Fuchs began in August, 1972 (P.136) and Montemarano worked on this investigation (P. 136).

Patrolman Montemarano first learned of the Eastern District Federal case involving the conspiracy by intercepting a phone call between Howard Fuchs and his attor-

ney, Neil Goldstein (P. 137) The electronic surveillance issued pursuant to an order signed April 9, 1973 by Justice Sullivan of the Bronx Supreme Court, and was effective until May 8, 1973 with respect to interceptions of any telephonic communication taking place over telephone #679=0673, listed to Howard Fuchs (P. 105). This order was extended on May 8, 1973 (P111) by Justice Asch (P111); appellant alleges that the information supplied in support of this extension order was false and, therefore, unlawfully issued (P. 111,112,A-77).[2]

These eavesdropping warrants were issued to state investigative authorities in relation to an investigation being pursued by the Bronx District Attorney's office (P.100-114).

## TESTIMONY OF MONTEMARANO

Upon learning of the federal investigation, Montemarano contacted Agent Murphy who was connected with the U.S. Customs Authorities in order to find out more about the federal investigation (P. 138)

Patrolman Montemarano met with Assistant U.S. Attorney DePetris on June 6, 1973 with respect to an arrest of David Kline (P.137) Patrolman Montemarano testified that they met in the office of Peter Grishman, a Bronx District Attorney, at the Bronx District Attorney's office (P139). Present at this June 6

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[2] "A" refers to pages in the Appendix.

meeting was Agent Batchelor, Assistant U.S. Attorney DePetris, Patrolman Montemarano, Assistant District Attorney Peter Grishman, and several other investigators (P. 139).

Patrolman Montemarano testified that at this meeting, NO INFORMATION FROM THE BRONX DISTRICT ATTORNEY'S INVESTIGATION WAS GIVEN TO FEDERAL AGENTS (P. 140).

On cross-examination, Patrolman Montemarano admitted that Patrolman George Martin had monitored and recorded the ENTIRE conversation had between Howard Fuchs and his attorney Neil Goldstein (P. 142)

Patrolman Montemarano notified Agent Murphy as to the conversation between Fuchs and his attorney (P.142);Agent Murphy was thereafter made aware of all the wire taps and was advised as to their substance (P. 142-144).

## TESTIMONY OF AGENT MURPHY

Agent Murphy was a special agent for the U.S. Customs Bureau (P. 144).He worked with the Bronx District Attorney's office investigating drug smuggling. He was a liaison between the U.S. Customs Bureau and the Bronx District Attorney, and concomitantly worked with those agents investigating the case in the Eastern District of New York ( P. 150).

Murphy first learned of Howard Fuchs from information developed by the Bronx District Attorney suggesting that Fuchs was dealing in narcotics (P.152) He contacted Special Agent Gustaf Fasseler who was with the U.S. Customs Bureau and was involved in the arrest of David Kline, and notified Fasseler of the telephone call intercepted between Fuchs and his attorney (P.152,153).

Murphy stated that on or about May 15 he provided Fasseler with information concerning the Bronx Investigation (P.154)obtained as a result of the wiretaps (P. 154,155).

On cross examination Murphy admitted that any and all information acquired from the Bronx District Attorney investigation was furnished to the appropriate federal authorities (P. 158).

He also stated, in direct contradiction to the testimony of Patrolman Montemarano, that on the June 6 meeting, there was a discussion among all those present at the meeting regarding the involvement of Howard Fuchs (P. 159,160).

## POINT I

THE COURT ERRED IN HOLDING THAT THE ELECTRONIC SURVEILLANCE OF FUCHS' PHONE WAS LEGALLY SUFFICIENT, SINCE THERE WAS NO ATTEMPT AT MINIMIZATION, AND CONSEQUENTLY ENTIRE CONVERSATIONS BETWEEN FUCHS AND HIS ATTORNEY WERE MONITORED AND RECORDED, THEREBY VIOLATING FUCHS' FOURTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES.

Traditionally, where four fundamental conditions are present, the interest of truth in the administration of justice has been subordinated in the law to the interest of preserving privileged communication:

(1) origin in confidence

(2) essentialness of confidentiality

(3) the importance of the relationship

(4) an injury to the relationship on breach which is disproportionate to the gain to the community.

See generally Section 8, Wigmore.

Under the umbrella of these criteria, four privileges have gained virtually universal protection and acceptance in our society: physician-patient, lawyer-client, husband-wife, and clergyman-confidant. 8 Wigmore 2290 et Seg.

Because the sixth amendment guarantees to a defendant in a criminal case the effective assistance of counsel, more than a generally accepted evidentiary privilege is in question when the communications of

lawyers and clients are incidentally or directly involved. Coplan v. United States, 191 F.2d 749 (D.C. Cir.), cert. denied, 342 U.S. 926 (1952).

Where direct surveillance takes place, moreover, an interference with the attorney-client relationship, the gravamen of the invasion, has been presumed. State v. Cory, 62 Wash.2d 371, 382 P.2d 1019. People v. Morhause, 21 N.Y.2d 66, 286 N.Y.S.2d 657, 233 N.E.2d 705 (1967).

It requires at the very least the granting of a new trial and the suppression of tainted evidence. Hoffa v. United States, 385 U.S. 293 (1966). State v. Cory, supra.

Congress realizing the inherent damages of "wholesale eavesdropping" attempted to guard against the dangers of unnecessary interceptions of innocent conversations and by regaining each order to contain a provision that the surveillance must be conducted in such a way as to minimize the monitoring of unauthorized communications, 18 U.S.C. 2518(5)(1970).

The minimization clause of Title 18 U.S.C. Sec. 2518(5) has been viewed by federal courts as an important protection of the fourth amendment rights of innocent third parties.

The object of minimization is to prevent the wiretap from turning into the kind of general search and wholesale invasion of privacy decried by the Supreme

Court in Berger v. New York, 388 U.S. 71, (1967) and Katz v. United States, 389 U.S. 347 (1967).

When Patrolman Vincent Montemarano was cross-examined (p. 141 et seg), he testified that entire conversations between Fuchs and his attorney, Neil Goldstein, were monitored and recorded and that the information received thereby was related to Federal Agent Murphy of U.S. Customs (P.141,142,143). This was in direct contradiction to statements made to the court by Assistant U.S. Attorney DePetris, who, when asked by the court whether all conversations were recorded, responded NO! The conversations were privileged communications between appellant and his attorney and related purely to investigation of the Bronx District Attorney.

The New York Court of Appeals, in Lanza v. New York State Joint Legislative Committee on Government Operations, 3 N.Y.2d 92, 164 N.Y.S.2d 9, (1957), stated:

> "It is clear that if such interference had occurred in connection with a proceeding directed against Lanza, any resulting determination would be annulled by the courts on the ground that the interference with his right to counsel had destroyed his constitutional right to a fair trial." (Fusco v. Moses, 304 N.Y. 424, 107 N.E.2d 581)

The purpose of New York Criminal Procedure Law

sec. 700.10, 700.15, and 700.30 is to severely limit the scope and duration of any eavesdropping authorization, People v. Pieri, 69 Misc 2d 1085, 332 S.2d 786 (1972), and requires that the execution of the eavesdrop be conducted in such a way as to minimize the interception of communications. The only way of minimizing the interception of a conversation not subject to eavesdrop is by cutting off that part of the equipment which would otherwise record that conversation.

It is clear that the mandate of the laws of the United States relevant to eavesdropping is that purely private conversations be private. Therefore, once the officers involved in an eavesdrop ascertain that a conversation is private, they are legally bound to terminate the intercept until that conversation is finished. People v. Castania, 73 Misc.2d 166, 340 N.Y.S.2d 829.

There must be strict compliance with provisions of the law permitting eavesdropping. It is clear that statutes authorizing interference with the rights of an individual to use his telephone with privacy must be strictly construed and any failure of compliance with legal requirements authorizing eavesdropping must deprive prosecuting authorities from using the fruits of such eavesdropping against the individual involved. People v. Castania, supra. People v. Ferrandino, 69 Misc.2d 508, 330 N.Y.S.2d 114.

It is vital that we judicially recognize the inviolable nature and right of the attorney-client privilege.

By justifying the kind of blanket surveillance executed by the authorities in their wiretap of Fuchs' phone and a record frought with contradictions by detectives and the assistant U.S. attorney, the requirement of minimization would be rendered nugatory, and the right of privacy on the one hand and the confidentiality of the attorney-client relationship on the other non-existent. U.S. v. Scott, 331 F.Supp. 233 (D.D.C. 1971). We cannot and must not allow the overhanging specter of electronic surveillance to become a mushrooming cloud obliterating the rights and equities expressly protected by the Constitution of the U.S.

It is at best a delicate balance which must be struck between the desire to judicially identify the guilty on the one side and the way in which we go about is to as to jeopardize the liberties and freedoms of the innocent on the other.

That Fuchs is alleged to have committed certain criminal acts should not serve as a blindfold whereby we justify the kind of heinous intrusion appellant suffered, and by imputation the public must suffer.

Fuchs is clothed in a presumption of innocence and this precious preseumption cannot be destroyed by unlawful and blatant disregard for express constitutional mandates.

It is no answer for the government to say it was impossible to distinguish between that which is privileged and proscribed and that which the warrant condones and prescribes. The conversations between Fuchs and his attorney were of sufficient length so that the constitutionally discriminating ear could have easily determined that they were beyond the scope of the eavesdrop warrant.

While the law seems to impliedly allow small fishing excursions where it is impossible, because of the length of time to determine the privileged nature of some conversations, it abhors and decries the type of deep sea fishing expedition which was taken at Fuchs' expense. There was not only sufficient time, but key indexing words such as "as my lawyer" or "legal advice" whereby the discriminating listener would immediately be put on actual notice that the conversation was private and privileged.

Because there was absolutely no attempt at minimization, Fuchs was deprived of his fourth, sixth, and fourteenth Amendment rights under the Constitution of the United States and therefore his conviction must be reversed.

## POINT II

APPELLANT'S CONVICTION MUST BE REVERSED AS THE AFFIDAVIT OF DETECTIVE DELGADO IN SUPPORT OF AN APPLICATION FOR ELECTRONIC SURVEILLANCE OF APPELLANT FUCHS' PHONE WAS LEGALLY INSUFFICIENT BECAUSE THE REQUISITE SHOWING OF EXIGENT CIRCUMSTANCES WAS BASED ON A MATERIAL MISSTATEMENT IN DIRECT CONTRADICTION TO THE MANDATES OF SEC. 700.15(4) OF THE N.Y.C.P.L. AND SEC. 2518 OF TITLE 18 OF U.S.C. AND THE FOURTH, FIFTH, AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES.

Before an eavesdropping warrant will be issued, there must be no reasonable alternative means for the acquisition of evidence or information. An eavesdropping warrant will not issue upon less than a showing "that normal investigative procedures have been tried and have failed, or reasonably appear to be unlikely to succeed if tried, or to be too dangerous to employ." New York Criminal Procedure Law, Sec. 700.15(4) 18 U.S.C. 2518 (1)(c).

This requirement is an example of the restrictions incorporated in the Criminal Procedure Law of New York by relegation of the Berger v. New York decision, 388 U.S. 41 181 L.Ed.2d 1040, 87 S.Ct. 1873 (1967) to a legislative reality. It is a recognition that eavesdropping is an extraordinary technique entailing an invasion which can be justified only as a last recourse. The requirement expressly dictates the enhaustion of conventional techniques of surveillance and search

before resorting to eavesdropping. Commission Staff Comment of Criminal Procedure Law, Sec. 700.15(4).

It is manifestly the legislative intent to sanction eavesdropping only upon a showing that either the normal investigative procedures have already been tried and failed, or that normal investigative procedures are reasonably likely to fail if attempted.

> "The need for particularity and evidence of reliability in the showing required when judicial authorization of a search warrant is sought is especially great in the case of eavesdropping." Berger v. New York, supra.

The courts have defined certain of those situations whereby it would appear that normal investigative procedures are reasonably likely to fail if attempted, probable cause would thus exist for the issuance of an eavesdropping warrant; e.g. United States v. Mainello, D.C.N.Y. 1972 345 F.Supp. 863 (arrest and search warrant not sufficient to obtain evidence of gambling ring). United States v. Tortorello, D.C.N.Y. 1972 342 F.Supp. 1029 (particular words not required in requisite finding and supporting affidavits are sufficient).

However, no cases exist in support of the position taken by the government discussed below with respect to the affidavit in support of application for an eavesdrop warrant on Appellant Fuchs' phone.

On April 9, 1973, Justice Sullivan signed a wiretap order effective until May 8, 1973, allowing the interception of any telephonic communications over telephone #679-0673, listed to Appellant Howard Fuchs. The affidavit of Detective Abelardo Delgado, in setting forth the exigent reasons for the wiretap, stated, "Legal parking during the daytime or nighttime is extremely hard if not impossible to find and that any car parked illegally would undoubtedly be noticed." (P. 106, A-77).

This explanation was given by Delgado and adopted at trial by the government in explication of the exigent circumstances requiring electronic surveillance. This was an intentional Sisyphian attempt to mislead the court. In actuality, parking was allowed. "There are two rows of meters on both sides of the street," (P.126) where "parking is allowed twenty-four hours a day," (P.126) and where "meters are plentiful" (P. 127).

This material misstatement of fact upon which the wiretap order was sought and issued, violates the clear legislative mandates of C.P.L. 700.15(4) and requires that the warrant be controverted. People v. Sciandra, 319 N.Y.S.2d 516 (1971).

In United States v. Carmichael, 14 Cr.L. 2128, the 7th Circuit Court of Appeals said:

"We now hold that a defendant is

> entitled to a hearing which delves below the surface of a facially sufficient affidavit, if he has made an initial showing of either of the following: (1) any misrepresentation by the government agent of a material fact, or (2) an intentional misrepresentation by the government agent, whether or not material." See also United States v. Dunnings, 425 F.2d 836, 840 2d Cir. 1969; United States v. Halsey, 257 F.Supp. 1002 (S.D.N.Y. 1966); Kipperman, "Inaccurate Search Warrant Affidavits as a Ground for Suppressing Evidence," 84 Harv.L.Rev. 825 (1971).

Appellant Fuchs, having made at the very least a showing of misrepresentation, is entitled to a hearing to "delve below the surface" of Detective Delgado's affidavit.

The showing of exigent circumstances necessary to warrant electronic surveillance was in no way the kind of showing envisioned by the legislators in C.P.L. 700.15(4) and 18 U.S.C. 2518 and, in point of fact, was in complete contradiction to their mandate.

The entire showing made by the government at the suppression hearing represented a conscious effort to contort and contrive material issues. The record is inundated with and obfuscated by misstatements, contradictions and calculated deletions of vital facts so as to deny Appellant Fuchs a fair trial.

Witness the direct contradictions of Assistant U.S. Attorney DePetris and Patrolman Montemarano with

respect to the issue of minimization, dealt with in Point I, and the deceptions connived to vitiate any hint at taint, discussed in Point V.

Because Appellant Fuchs' conviction was based on such abrogations of his fourth, fifth, sixth, and fourteenth Amendments Rights and in direct contravention of the legislative mandates of Sec 700.15(4) of the C.P.L. and 2518 of Title 18, U.S.C., it must be reversed.

## POINT III

THE GOVERNMENT FAILED TO MEET ITS BURDEN OF SHOWING THAT ITS EVIDENCE WAS SUFFICIENTLY ATTENUATED FROM THE UNLAWFUL WIRETAP AND RESULTED FROM AN INDEPENDENT FEDERAL INVESTIGATION.

The threshold issue involved is whether the identities and subsequent testimonies of Arlen, Richner, and Cohn, the government's witnesses at the trial were the derivative product of the illegal wiretap on Appellant Fuchs' phone.

At the suppression hearing, the prosecution attempted to prove that there was a sufficient federal investigation so as to vitiate the possible illegal taint clothing the prosecutions witnesses by virtue of any connection with the alleged illegal wiretap surveillance ordered and exercised with respect to the Bronx investigation.

The prosecution called Patrolman Vincent Montemarano, assigned to the Bronx District Attorney's office. Patrolman Montemarano aided in the on-going investigation of Appellant Howard Fuchs (P. 133, 136).

On direct examination by Assistant U.S. Attorney DePetris, Patrolman Montemarano testified that on June 6, 1973 he attended a meeting at the Bronx District Attorney's office to discuss the arrest of one David Kline (P. 139). According to Montemarano, those present at the meeting, besides himself, were Peter

Grishman of the Bronx District Attorney's office, Agent Batchelor, a special agent from the Federal Investigative authority, Assistant U.S. Attorney DePetris and, "other investigators." (P. 139) When asked whether anything was mentioned or discussed at that meeting with respect to Appellant Howard Fuchs, or in general with regard to the Bronx investigation, Patrolman Montemarano stated categorically that the only information requested or communications transpiring among those present in relation to the Bronx District Attorney's investigation and Appellant Howard Fuchs involvement therein was a request by the federal agents for certain "toll calls" charged to Appellant Fuchs' telephone (P. 140).

Beyond that request, according to Patrolman Montemarano, no information acquired as a result of the Bronx District Attorney's investigation was divulged to the federal authorities (P. 140), and no information concerning Appellant Howard Fuchs was discussed (P. 140).

The prosecution's next witness was a special agent of the U.S. Customs Bureau, Thomas Murphy. The direct examination of Agent Murphy completely circumscribed the June 6th meeting.

It was only on cross-examination that it became apparent that Agent Murphy was one of the so-called "other investigators" referred to so innocuously by Patrolman Montemarano.

Agent Murphy, and it should be noted that this was brought out only upon cross-examination, that during the June 6th meeting which Assistant U.S. Attorney DePetris attended, along with Agent Murphy and Patrolman Montemarano, there was extensive discussion among those present with respect to the involvement and culpability of Appellant Howard Fuchs (P. 158-160).

Patrolman Montemarano's misstatement was material in that it directly related to the issue of whether there was a sufficient federal investigation which resulted in the prosecution's proof at trial and furthermore, precluded the Appellant from sufficiently proving that a substantial portion of the prosecution's case resulted from the illegal wiretap surveillance.

At no time and in no respect was this highly infectious and prejudicial misstatement of facts called to the attention of the court. We can only now wonder what other testimony was perjurious and how many other material facts were misstated.

It is apparent that at the June 6th meeting, investigating authorities representing the federal and state authorities were in attendance, and copious discussions transpired with respect to the involvement of Appellant Fuchs.

At once it becomes difficult if not impossible to believe that Patrolman Montemarano was not familiar with Agent Murphy with whom Montemarano, by his own testimony, had worked in close circumstance for several months (P. 142, 143, 144).

The requirement that the government prove its case beyond a reasonable doubt requires that the investigating officials themselves should not, in any way, by any failure to disclose relevant evidence, prevent the Appellant from producing evidence which might create a reasonable doubt. Our standards of fair play in federal criminal proceedings require that the evidence be presented in its true colors. United States v. Zborewski, 271 F.2d 661 (2nd Cir. 1959).

The identities of Arlen, Richner, and Cohn were derived directly from the unlawful wiretap of Appellant Fuchs' phone. After being questioned by police, they were unwilling to testify or admit to any unlawful conduct until threatened by government authorities.

While the proffer of a living witness should not be mechanically equated with the proffer of inanimate evidentiary objects illegally seized, the government failed to carry its burden of showing that the information gained from the wiretap did not lead directly or indirectly to the discovery of Arlen, Richner, and Cohn, and their willingness to testify. United States v. Coplan, 185 F.2d 629, 28 A.L.R.2d 1041; Smith v.

United States, 324 F.2d 879 (1963); McLinden v. United States, 117 U.S.App.D.C., 329 F.2d 238 (1964).

The testimony of Patrolman Montemarano, New York Police Department, in substance was that he was at all times in close contact with the federal investigative authorities and related to them the information adduced from the unlawful wiretaps.

To the same effect was the testimony of Special Agent Murphy who was a "liaison" between all the coordinate investigating authorities, both federal and state, and who was briefed as to the substance of the information gained from the unlawful wiretaps.

At no time did the government meet its burden of proving that the information gained from the unlawful wiretap did not lead directly or indirectly to the discovery of any of the evidence it introduced. United States v. Coplan, 185 F.2d 629.

At best it showed a confused and co-mingled disquisition, with no indication of where it began or from whom the information was learned.

The government's witnesses exchanged and re-exchanged evidence so that by the time they were called on to testify, both the source and substance had become intolerably confused and confusing.

As has been discussed in Points I and II, supra, the picture emerging from the testimony of the government's witnesses is not one of constitutionally con-

scious investigations thirsting for justice and truth, but rather a systematic and conscious effort to thrust thirsting spears out among the suspected and wind in and convict them in any possible way.

However, the government failed to meet its heavy burden in this regard. United States v. Coplan, 185 F.2d 629, 28 A.L.R.2d 1041.

Indeed, the record rather demonstrates that the identities of Cohn, Arlen, and Richner and knowledge of their implication in unlawful activities were directly derived from the tap, and they were threatened and coerced thus to testify. The line drawn to the testimony from the tap may be winding and long, but it is unbroken nevertheless.

The government raised the implication that the holdings in the cases of Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407; 9 L.Ed.2d 441 and People v. Scharfstein, 52 Misc. 2d 976, 277 N.Y.S.2d 516 (1967) should be controlling. The taint of the unlawful seizure in those cases, however, was sufficiently attenuated with respect to the evidence derived therefrom as to be held not fruits of poison tree: the confessions were voluntary, and the taint deemed dissipated.

The instant case is distinguishable because, by their own testimony, the government's witnesses against Appellant Fuchs were threatened and coerced, and the

wiretap and fruits gained therefrom were exploited so as to infect and enlarge the taint rather than dissipate its enveloping character. United States v. Tane, 329 F.2d 848 (1964).

The government evidence was contorted completely out of shape and the decision to prosecute in the federal courts only came after a juxtaposition of fear and reality, and it was realized that the inherent dangers of the wiretaps themselves and lack of corroboration would present too much of a barrier in the state court.

The interrelated nature of the federal and state investigations in this case and the resulting evidence adduced therefrom, deploringly proclivitate towards what the law has come to denote and decry as the "Silver Platter Doctrine," whereby the state investigative authorities handed the federal authorities a case, derived from unlawful seizures, on a silver platter. Rea v. United States, 350 U.S. 214, 100 L.Ed. 333; Elkins v. United States, 364 U.S. 206; Mapp v. Ohio, 367 U.S. 643. Nardone v. U.S., 308 U.S.338, 84 L.Ed. 307.

However, the government transgresses further. They apparently not only wanted their evidence delivered to them on a silver platter, but hungered for it to be fed to them with a silver spoon. The law must not countenance such deliberate abuses of fundamental constitutional rights. Berger v. New York, 388 U.S. 41,

87 S.Ct. 1873; 18 L.Ed. 2d 1040. United States v. George, 465 F.2d 772.

Must we in a court of law listen to a witness testify that she was "threatened" and coerced into testifying by an Assistant District Attorney and various other state authorities? (P. 628) Is this the measure of justice we exact in our society?

The articulations of law have always been justice and equality. The equation will not stand for coercion, threats and fear.

Each of the government's witnesses on cross-examination indicated the abusive techniques exercised by the investigative authorities to produce desired testimony. While immunity and sentence negotiation are well accepted inputs in our criminal justice system, when we take justifiably condoned measures and convert them into tools and techniques for oppression and fear, we are no longer dealing with the exactment of truth and identification of guilt but rather nudging and indurating towards the tyrannical and fascistic abberations witnessed by history in societies far removed and years long past.

The dignity of the law will become a meaningless phrase, however well sounding, unless we give it concrete application in the manifold instances in which the meaning of the phrase is put to the test.

Because the government's witnesses were appro-

priated from and exploited by an unlawful wiretap on Appellant Fuchs' telephone, and further because the government failed to carry its burden of showing an independent federal investigation, Appellant Fuchs is entitled to a full hearing on this issue and his conviction should be reversed.

## POINT IV

THE COURT ERRED IN NOT ALLOWING THE DEFENSE TO SEE CERTAIN RECORDS OF THE BRONX INVESTIGATION WHICH WERE RELEVANT TO THE ISSUE OF THE TAINT DETERMINATIVE OF WHETHER THE EVIDENCE OF THE PROSECUTION WAS FRUITS OF THE POISON TREE.

The government offered into evidence a report marked Government Exhibit 7 (P166) transmitted from Agent Mruphy to one John Fallan, who was in charge of the Bureau of Customs dealing with the investigations taking place in the Eastern District as well as the Bronx investigation (P. 162, 163, 164).

The facts in the report dealing with the Bronx investigation were sealed and counsel for Appellant was not allowed to see that portion (P164,165). The government also offered into evidence a report, marked Government Exhibit 8 (P167), which was prepared by Agent Fassler, with respect to his investigation, parts of which were similarly sealed and not shown to Appellant.

Even if the government claims that disclosure of its records will be attended by potential danger to the reputation or safety of third persons or to the national security, government records with respect to electronic surveillance to which the defendant in a criminal case has standing to object should be turned over to defendant without being screened in camera by

the trial judge, where such surveillance is claimed to have contributed to the government case. The task of determining which information might have contributed to the government case is too complex and the margin for error too great to rely wholly on the in camera judgment of the trial judge to identify those records which might have so contributed. And if the trial judge's hearings are to be more than a mere formality and the defendants not left entirely to reliance on government testimony, there should be turned over to them the records of the wiretap investigation which the government was not entitled to use in building its case against them. Alderman v. United States, 394 U.S. 165, 22 L.Ed. 176, 89 S.Ct. 961.

The trial judge must give an opportunity to the accused to prove that a substantial portion of the case against him was the fruit of an illegal search. Alderman v. United States, supra. United States v. Coplan, supra. By not allowing counsel for Appellant Fuchs to view the reports of the federal investigators concerning their investigation, Appellant was precluded from submitting his proof.

The government chose to prosecute in the federal courts. They realized the necessity of proving a separate independent federal investigation. They forced Appellant into an evidentiary situation whereby he had to show the nature and extent of the taint,

but they would not let him see the records so necessary to his proof and which he was entitled to. United States v. Andolschek, 142 F.2d 503 (2 Cir.).

The disclosure of information Appellant Fuchs was entitled to should include disclosures made in the course of criminal investigations, even though it might be necessary to disclose information to possible witnesses. People v. Saperstein, 2 N.Y.2d 210, 140 N.E.2d 252. More importantly, however, it should include information sharing systems between law enforcement agencies. People v. Saperstein, supra. "Moral Dilemma of Wiretapping", Sam Dash. 49 Coronet 45, March 1961.

From its inception the federal prosecution in this case has been an effort to mask errors, cover up lies and miscalculations, and prevent Appellant from receiving a fair and just trial.

Because Appellant Fuchs was not allowed to see these records to determine and prove the nature of the taint, and because the hearing was thus insufficient, Appellant Fuchs' conviction should be reversed.

## CONCLUSION

Because the electronic surveillance on Appellant Howard Fuchs' telephone was unlawful, and the evidence seized therefrom, "fruits of the poison tree"; and because there was no independent federal investigation so as to dissipate the taint on the government's evidence; and further, because portions of the record within the custody of the prosecution introduced into evidence were sealed and Appellant's counsel not allowed to see them, Appellant Howard Fuchs' conviction must be reversed.

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Respectfully submitted,

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Received 0/ copy of the within
Appellant's Brief
this 22 day of March, 1914.

Sign _____

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